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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13
14 HM ELECTRONICS, INC., a
California corporation,

15 Plaintiff,

16
17 v.

18 R.F. TECHNOLOGIES, INC., an
Illinois corporation,

19 Defendant.
20

Case No. 12-cv-2884 BAS (MDD)

**ORDER DENYING
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

[ECF 232]

21 Presently before the Court is Defendant R.F. Technologies, Inc.'s ("RFT")
22 motion for partial summary judgment. ECF 232. The Court finds this motion
23 suitable for determination on the papers submitted and without oral argument. *See*
24 Civ. L.R. 7.1(d.1). For the reasons set forth below, the court **DENIES** Defendant's
25 motion. ECF 232.
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I. BACKGROUND

HM Electronics (“HME”) is a prominent figure in the Quick Service Restaurant industry. Haas Decl. ¶ 16, ECF 35-2. Among other things, Plaintiff manufactures wireless drive-thru headsets and provides repair services for its products. *Id.* Defendant repairs and refurbishes drive-thru headsets, including Plaintiff’s. Noorian Decl. ¶¶ 2, 5, ECF 40-1. Defendant is not an authorized seller or repair service for Plaintiff’s headsets. Haas Decl. ¶ 23.

After repairing Plaintiff’s headsets, it was Defendant’s practice to dispose of the HME casings and replace them with RFT-branded casings. Haas Decl. ¶ 29. This has purportedly caused customer confusion, which has resulted in customers mistakenly sending their headsets to Defendant for repair instead of Plaintiff. *Id.* at ¶¶ 30–33. Additionally, Plaintiff states Defendant engages in a “bait and switch” by advertising HME products for sale and shipping customers RFT-manufactured products instead. *Id.* at ¶ 27. Plaintiff brought this suit against Defendant alleging injury to its trademark. *See* FAC ¶¶ 8–10, 34, 36–42, ECF 156.

II. LEGAL STANDARD

Summary judgment is appropriate on “all or any part” of a claim if there is an absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“*Celotex*”). A fact is material when, under the governing substantive law, the fact could affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. *See Celotex*, 477 U.S. at 323–24.

The moving party bears the initial burden of establishing the absence of a

1 genuine issue of material fact. *See Celotex*, 477 U.S. at 323. “The burden then
 2 shifts to the nonmoving party to establish, beyond the pleadings, that there is a
 3 genuine issue for trial.” *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th
 4 Cir. 2006) (citing *Celotex*, 477 U.S. at 324).

5 “[W]hen the non-moving party bears the burden of proving the claim or
 6 defense, the moving party can meet its burden by pointing out the absence of
 7 evidence from the non-moving party. The moving party need not disprove the other
 8 party's case.” *Miller*, 454 F.3d at 987 (citing *Celotex*, 477 U.S. at 325). “Thus,
 9 ‘[s]ummary judgment for a defendant is appropriate when the plaintiff fails to make
 10 a showing sufficient to establish the existence of an element essential to [his] case,
 11 and on which [he] will bear the burden of proof at trial.’ ” *Miller*, 454 F.3d at 987
 12 (quoting *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 805–06 (1999)
 13 (internal quotations omitted)).

14 A genuine issue at trial cannot be based on disputes over “irrelevant or
 15 unnecessary facts[.]” *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*,
 16 809 F.2d 626, 630 (9th Cir. 1987). Similarly, “[t]he mere existence of a scintilla of
 17 evidence in support of the nonmoving party's position is not sufficient.” *Triton*
 18 *Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing
 19 *Anderson*, 477 U.S. at 252).¹ The party opposing summary judgment must “by [his
 20 or her] own affidavits, or by the ‘depositions, answers to interrogatories, and
 21 admissions on file,’ designate ‘specific facts showing that there is a genuine issue
 22 for trial.’ ” *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). That party
 23 cannot “rest upon the mere allegations or denials of [his or her] pleadings.” Fed. R.
 24 Civ. P. 56(e).

25 When making its determination, the Court must view all inferences drawn
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27 ¹ *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (if
 28 the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment
 by merely demonstrating “that there is some metaphysical doubt as to the material facts”).

1 from the underlying facts in the light most favorable to the nonmoving party. *See*
 2 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).
 3 “Credibility determinations, the weighing of evidence, and the drawing of
 4 legitimate inferences from the facts are jury functions, not those of a judge, [when]
 5 ruling on a motion for summary judgment.” *Anderson*, 477 U.S. at 255.

6 **III. DISCUSSION**

7 A. Plaintiff’s Claim for Intentional Interference with Prospective Economic 8 Advantage

9 Defendant argues Plaintiff’s sixth cause of action for intentional interference
 10 with prospective economic advantage should be dismissed because Plaintiff has not
 11 identified any economic relationship with a third party with which Defendant
 12 interfered. Def.’s Mot. 8–9.

13 Plaintiff must prove “(1) an economic relationship between the plaintiff and
 14 some third party, with the probability of future economic benefit to the plaintiff; (2)
 15 the defendant’s knowledge of the relationship; (3) intentional acts on the part of the
 16 defendant designed to disrupt the relationship; (4) actual disruption of the
 17 relationship; and (5) economic harm to the plaintiff proximately caused by the acts
 18 of the defendant.” *CRST Van Expedited, Inc. v. Werner Enters. Inc.*, 479 F.3d 1099,
 19 1107–08 (9th Cir. 2007) (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29
 20 Cal.4th 1134, 1153 (2003)). The relationship must already exist and may not be
 21 speculative. *Roth v. Rhodes*, 25 Cal. App. 4th 530, 546 (1994). Defendant
 22 challenges only on the grounds that no such relationships have been identified.
 23 Def.’s Mot. 9:1–16.

24 Plaintiff’s Rule 26(a)(1) initial disclosures listed witness contact information
 25 for Dunkin’ Brands, Northshore Management, and McDonald’s, together with the
 26 statement that the witnesses possessed information concerning “[Defendant’s]
 27 intentional interference with [Plaintiff’s] economic relationships with its customers
 28 and prospective customers.” Vanderhoof Decl. Ex.A, 7, 11–12, ECF 232-3. In

1 Defendant's first set of interrogatories, Defendant asked Plaintiff to "IDENTIFY all
 2 HM Electronics economic relationships which were interfered or disrupted as a
 3 result of any conduct by RF Technologies, its employees or management." Herrera
 4 Decl. Ex. 1, 13, ECF 250-1. Plaintiff provided the names of thirty-one individuals
 5 and contact information for twenty-four of them. *Id.* at 13–14. Plaintiff further
 6 provided an email chain in which an HME representative attempted to persuade a
 7 Dairy Queen owner that Defendant provided misinformation. *Id.*, Ex. 4 (HME: "I
 8 understand that you need to do what you think is right for your company. . . . If you
 9 decide to go with the RF tech, we will understand.").

10 Plaintiff has sufficiently identified third-party relationships with which
 11 Defendant possibly interfered. Defendant has not proved entitlement to summary
 12 judgment because Plaintiff has provided evidence to support its claim. Def.'s Reply
 13 4. Determining whether this evidence meets Plaintiff's burden is therefore delegated
 14 to the fact finder. *Anderson*, 477 U.S. at 255. Accordingly, Defendant's motion is
 15 **DENIED** insofar as it relates to Plaintiff's cause of action for intentional
 16 interference with prospective economic advantage.

17 *B. Plaintiff's Prayer for Corrective Advertising Damages*

18 "An award of the cost of corrective advertising, like compensatory damage
 19 awards in general, is intended to make the plaintiff whole. It does so by allowing
 20 the plaintiff to recover the cost of advertising undertaken to restore the value
 21 plaintiff's trademark has lost due to defendant's infringement." *Adray v. Adry-Mart,*
 22 *Inc.*, 76 F.3d 984, 988 (9th Cir. 1995) (citing *Zazu Designs v. L'Oreal, S.A.*, 979
 23 F.2d 499, 506 (7th Cir. 1992)). "A plaintiff need not show a specific measure of
 24 harm to its goodwill and reputation in order to recover corrective damages." *Quia*
 25 *Corp. v. Mattel, Inc.*, No. C 10–1902, 2011 WL 2749576, at *4 (N.D. Cal. July 14,
 26 2011) (citing *Adray*, 76 F.3d at 988). "However, compensatory damages are
 27 appropriate only where a plaintiff has shown that in fact it has been injured; it still
 28 must present non-speculative evidence that goodwill and reputation—that is, the

1 value of its mark—was damaged in some way.” *Id.* (citation omitted).

2 The record contains voluminous evidence of Defendant’s conduct regarding
3 Plaintiff’s products. A fact finder could reasonably find that Plaintiff’s trademark
4 was damaged and that Defendant therefore owes Plaintiff compensatory damages.

5 Defendant argues that *Adray*, 76 F.3d at 989, requires corrective advertising
6 damages to not exceed the value of the relevant trademark, and since Plaintiff has
7 not introduced any evidence valuing its trademark, Plaintiff cannot recover these
8 damages. Def.’s Mot. 9–12. There are multiple ways to value a trademark. *See*
9 Kennedy Decl. ¶¶ 16–18, ECF 297. Under the “cost approach” the value of the
10 trademark is the cost of creating or obtaining the trademark, which includes, among
11 other things, marketing and advertising costs. Michael J. Freno, *Trademark*
12 *Valuation: Preserving Brand Equity*, 97 Trademark Rep. 1055, 1058 (2007). “In a
13 sense, advertising costs most accurately reflect trademark value: the more one
14 advertises a mark, the more public recognition inures to the mark, which increases
15 its value.” *Id.* at 1058–59.

16 One of the methods for calculating corrective advertising damages is to
17 award the injured party 25% of the defendant’s relevant advertising costs. *See Int’l*
18 *Oddities v. Record*, No. CV 12–3934, 2013 WL 3864050, at *14 (C.D. Cal. 2013);
19 *Adray*, 76 F.3d at 988. Defendant’s argument overlooks the fact that 25% of its
20 advertising for HME products can never be more than the value of HME’s
21 trademark under the cost approach. Defendant cannot spend more money
22 advertising the HME brand than what Defendant believed the brand to be worth.

23 Plaintiff’s damages expert calculated 25% of Defendant’s advertising
24 expenses to be approximately \$960,000. *See* Kennedy Decl. ¶ 16–17; Pl’s Opp’n
25 15–16. Given that Plaintiff is highly prominent in the QSR industry and has itself
26 invested more than \$5 million in advertising over the last several years, 25% of
27 Defendant’s relevant advertising costs appears to be lower than the trademark’s
28 value. *See* Haas Decl. ¶ 16, ECF 35-2. Since there is at least one viable method for


1 determining corrective advertising damages, Plaintiff's prayer for corrective
2 advertising need not be dismissed at this time.

3 **IV. CONCLUSION**

4 Accordingly, the Court **DENIES** Defendant's motion for partial summary
5 judgment. ECF 232.

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7 **IT IS SO ORDERED.**

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9 **DATED: April 17, 2015**


10 **Hon. Cynthia Bashant**
11 **United States District Judge**